88-1886

No. ____

Supreme Court, U.S.
FILED
MAY 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

Johnnie Gilbert, et. al.,
Petitioners.

V.

City of Little Rock, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VOLUME II
APPENDIX

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2128
No. 87-2189

Johnnie Gilbert, Horace Walters, Andrew Lockhart, and Billy O'Donald,	*	
Appellants/Cross-appellees,	*	
v.	*	
The City of Little Rock, Arkansas; The Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson, individually and in his official capacity as Chief of Police of the City of Little Rock, Arkansas; and Carlton E. McMullin, individually and in his official capacity as City Manager of the City of Little Rock, Arkansas,	*	Appeals from United States District Court for the Eastern District of Arkansas
Appellees/Cross-appellants.	*	
Julius Bryant, Jack Matlock, Mixie Alexander, Jesse Briscoe, Grady Anthony, Marcella Wilson, and Larry Bazzelle,	*	
Intervenors-Below.	*	

Submitted: December 8, 1988

Filed: January 27, 1989

Before LAY, Chief Judge, HEANEY,* McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, *en banc.*

PER CURIAM.

The order of the district court [1] awarding appellants expert witness fees as expenses under 42 U.S.C. § 1988 at the statutory rate of $30 per day, 28 U.S.C. § 1821, for a total award of $900.00, [2] is affirmed by the vote of an equally divided court.

The remaining issues are remanded to the original panel for decision.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

*The HONORABLE GERALD W. HEANEY assumed senior status on January 1, 1989.

1 The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

2 *Gilbert v. City of Little Rock*, No. LR-C-78-340, slip op. at 9-10 (E.D. Ark. Aug. 7, 1987) (order), *citing Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987).

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2128
No. 87-2189

Johnnie Gilbert, Horace Walters, Andrew Lockhart, and Billy O'Donald,	*	
Appellants/Cross-appellees,	*	
v.	*	
The City of Little Rock, Arkansas; The Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson, individually and in his official capacity as Chief of Police of the City of Little Rock, Arkansas; and Carlton E. McMullin, individually and in his official capacity as City Manager of the City of Little Rock, Arkansas,	*	Appeals from United States District Court for the Eastern District of Arkansas
Appellees/Cross-appellants.	*	
Julius Bryant, Jack Matlock, Mixie Alexander, Jesse Briscoe, Grady Anthony, Marcella Wilson, and Larry Bazzelle,	*	
Intervenors-Below.	*	

Submitted: December 8, 1988

Filed: January 27, 1989

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HANSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

The court en banc has remanded the non-expert witness fees issues raised in these appeals to the original panel for decision.

In appeal No. 87-2128, Johnnie Gilbert, Horace Walters, Andrew Lockhart, and Billy O'Donald (appellants) appeal from a final order entered in the District Court [1] for the Eastern District of Arkansas limiting appellant Walters's recovery of backpay to $331.73. *Gilbert v. City of Little Rock*, No. LR-C-78-340 (E.D. Ark. Aug. 4, 1987) (order). For reversal, appellants argue the district court erred in refusing to award Walters backpay on the basis of the salary of a lieutenant. In appeal No. 87-2189, the City of Little Rock (the City) cross-appeals from the district court's order awarding appellants $184,969.50 in attorney's fees. For reversal, the City argues that the district court erred in (1) refusing to further reduce the number of compensable hours, (2) refusing to further reduce the award of attorney's fees for failure to completely prevail, and (3) enhancing the award of attorney's fees.

*The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

1 The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

For the reasons set forth below, we affirm the order of the district court, as modified herein.

BACKGROUND

On September 27, 1978, appellants filed a complaint in district court against the City and others alleging racial discrimination by the City of Little Rock Police Department (LRPD), in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), 42 U.S.C. §§ 1981, 1983, and the fourteenth amendment. Other parties subsequently intervened as plaintiffs. Appellants and intervenors charged LRPD with racial harassment, discriminatory disciplinary policies, and discriminatory promotional policies, and sought injunctive relief and compensatory and punitive damages. The district court found neither intentional discrimination nor disparate impact and dismissed the complaint. *Gilbert v. City of Little Rock*, 544 F. Supp. 1231, 1261 (E.D. Ark. 1982). On appeal, this court affirmed the dismissal of the racial harassment and discriminatory discipline claims but remanded the discriminatory promotions claim. *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). The district court on remand again dismissed the discriminatory promotions claim. *Gilbert v. City of Little Rock*, No. LR-C-78-340 (E.D. Ark. June 7, 1985).

On appeal after remand, this court reversed, finding that appellants had been discriminated against on the basis of their race through the LRPD promotional system, and remanded to the district court to determine the compensation to be awarded. *Gilbert v. City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986). We instructed that appellants should be permanently promoted to sergeant as soon as positions are available and should be compensated for lost wages and benefits from the date they would have been promoted absent discrimination until they actually were promoted. *Id.* at 1216. We also noted that appellants could apply to the district court for attorney's fees. *Id.*

On remand, the parties stipulated the amounts of compensation appellants Gilbert, O'Donald, and Lockhart should receive. The parties were unable to agree on the proper compensation for appellant Walters. Walters was actually promoted to sergeant in September 1980, not long after July 1980, the date he would have been promoted absent discrimination. Walters was further promoted to lieutenant in October 1983. The City believed that Walters should be awarded backpay for the period between July 1980, when he would have been promoted to sergeant absent discrimination, and September 1980, when he actually was promoted. Walters maintained that, but for the discrimination, he would have been promoted to *lieutenant* in October 1981, rather than October 1983, and accordingly should be awarded backpay on that basis. The district court ruled in favor of the City because it found to be speculative Walters's claim that he would have been promoted to lieutenant earlier. Slip op. at 2-3.

The district court also ruled on appellants' request for attorney's fees and costs pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Three of appellants' attorneys requested an award of attorney's fees: Thomas M. Bramhall, Ralph C. Ohm, and Phillip J. Duncan. Bramhall requested compensation for 153.75 hours at the rate of $125.00 per hour. The City conceded the reasonableness of Bramhall's hours, but challenged the $125.00 hourly rate as excessive. The district court granted Bramhall compensation at the rate of $110.00 per hour and awarded him attorney's fees in the amount of $16,912.50. Slip op. at 5-6.

Ohm sought compensation for 354.94 hours at the rate of $65.00 per hour for his work as an attorney and 239.50 hours at $25.00 per hour for his work as a law clerk. The district court reduced Ohm's attorney hours to 300 and reduced his overall attorney's fee by fifteen percent due to the failure of appellants to completely prevail. *Id.* at 6. The

district court also enhanced Ohm's fee by fifteen percent because of "the undesirability of this case, the difficulty of the questions presented, the time and labor required, the length of the professional relationship with [appellants,] and the contingent nature of the fee," *id.*, and awarded Ohm $25,048.75 in attorney's fees. *Id.* at 7.

Duncan requested compensation for 1,662.69 hours at the rate of $125.00 per hour. The district court reduced the number of compensable hours to 1,330 and determined that a reasonable hourly rate was $110.00. *Id.* at 7-8. The district court then reduced and enhanced Duncan's award, as it had previously done with Ohm's fee, and awarded Duncan $143,008.25 in attorney's fees. *Id.* at 8.

As to costs, the district court awarded appellants $3,302.35 for transcript and deposition costs and $3,960.24 for out-of-pocket expenses. *Id.*

Appellants also claimed $93,946.69 in expert witness fees and expenses. The district court noted that "[u]ntil recently, the Court would have been inclined to award [appellants] the lion's share of the expert witness fees requested," *id.* at 9-10, but felt constrained by *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987) (*Crawford Fitting*), to limit the recovery of expert witness expenses to thirty dollars per day. Slip op. at 13. Accordingly, the district court limited its award of expert witness fees to $900.00. *Id.*

A panel of this court affirmed the district court's order as modified and remanded with directions. Appellants' petition for rehearing en banc was granted, thus vacating the panel opinion, because the analysis of the expert witness fees issue was in conflict with *SapaNajin v. Gunter*, 857 F.2d 463 (8th Cir. 1988). The order of the district court awarding appellants expert witness fees as expenses under 42 U.S.C. § 1988 at the statutory rate of $30 per day, 28 U.S.C. § 1821, was affirmed by the vote of an equally divided

court. The remaining issues were remanded to the original panel for decision.

BACKPAY

Appellant Walters argues that the district court erred in refusing to award him backpay calculated with reference to the salary of a lieutenant rather than a sergeant. Absent discrimination, Walters would have been promoted to sergeant in July 1980. Because of this court's determination in *Gilbert v. City of Little Rock*, 799 F.2d 1210, that Walters had been denied promotion on the basis of racial discrimination, he was promoted to "acting" sergeant in September 1980. Walters was paid the salary of a permanent sergeant, [2] but, as an "acting" sergeant, he was ineligible to be considered for promotion to lieutenant. To be eligible for promotion to lieutenant, an officer must have served as a "permanent" sergeant for one year. Walters was promoted to permanent sergeant in 1982 and to lieutenant one year later in October 1983. Walters now argues that he should be awarded backpay at the salary of a lieutenant because, absent discrimination, he would have been promoted to permanent sergeant in 1980, and further promoted to lieutenant in 1981, rather than 1983.

The purpose of backpay is to "mak[e] persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (footnote omitted). Backpay is available to remedy discrimination in a promotional system, however, only where the employee would have been promoted absent discrimination. Because backpay is an equitable remedy, there must be some certainty that the promotion would have occurred absent the discrimination. That degree of certainty is absent in the case of appellant Walters. Although he would have been

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2 The district court awarded Walters $331.73 in backpay to compensate him for the period from July to September 1980 that he would have been a sergeant absent discrimination.

promoted to permanent sergeant in 1980 absent discrimination, Walters's claim that he would then have been promoted to lieutenant in 1981 is nothing more than conjecture. There is no reason to believe that just because Walters was promoted to lieutenant within a year of becoming a permanent sergeant in 1982, he would similarly have been promoted to lieutenant in 1981 within a year of becoming a permanent sergeant in 1980. An award of backpay cannot be made on such a speculative basis.

Accordingly, we hold the district court did not err in refusing to award Walters backpay on the basis of the salary of a lieutenant.

ATTORNEY'S FEES

The City challenges several aspects of the district court's award of attorney's fees. First, the City argues that the district court should have further reduced the number of compensable hours claimed by Phillip J. Duncan. Duncan requested compensation for 1,662.69 hours, and the district court awarded him compensation for 1,330 hours. The City argues that 1,330 hours is an unreasonable figure.

The number of hours to be awarded to a prevailing party under 42 U.S.C. § 1988 is committed to the discretion of the district court. *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1274 (8th Cir. 1981). "The trial judge should weigh the hours claimed against his [or her] own knowledge, experience, and expertise of the time required to complete similar activities." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *see also Ladies Center, Nebraska, Inc. v. Thone*, 645 F.2d 645, 648 (8th Cir. 1981). At this stage of the proceedings, "[t]he trial judge is in a much better position to make this appraisal than we are." *Jaquette v. Black Hawk County*, 710 F.2d 455, 461 (8th Cir. 1983). The district court has already reduced Duncan's requested compensable hours by 332.69 hours. In view of the complex and extended nature of this litigation, we are

unable to hold that the district court abused its discretion in concluding that Duncan should be compensated for 1,330 hours of his legal work.

The City also challenges the district court's refusal to further reduce the award of attorney's fees due to the failure of appellants to completely prevail in the litigation. The district court reduced the attorney's fee award by fifteen percent because only four of the thirteen original plaintiffs in this cause were granted relief and a number of appellants' claims were found to lack merit. Appellants were successful, however, in prevailing on substantial issues in the case. They demonstrated that the promotional practices of LRPD were racially discriminatory and obtained appropriate relief including backpay. "Where a plaintiff has obtained excellent results, his [or her] attorney should receive a fully compensatory fee . . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (*Hensley*). Furthermore, even where a plaintiff has only partially prevailed on his or her claims, "[a] court should not disallow attorney hours related and necessary to successful claims." *Catlett v. Missouri Highway & Transportation Comm'n*, 828 F.2d 1260, 1270 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1574 (1988). Appellants did not completely prevail in this litigation, and the district court reduced their award to reflect that partial failure. The district court "necessarily has discretion in making this equitable judgment," *Hensley*, 461 U.S. at 437, and we are unable to conclude that it abused its discretion in reducing the attorney's fee award by fifteen percent.

The district court also enhanced the attorney's fee award by fifteen percent due to (1) the undesirability of this case, (2) the difficulty of the questions presented, (3) the time and labor required, (4) the length of the professional relationship with appellants, and (5) the contingent nature of the fee. The City correctly points out that the first four of

these five factors cannot serve as bases for enhancing an award of attorney's fees because they are already reflected in the initial determination of the reasonable hourly rate and number of compensable hours. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564-66 (1986) (*Delaware Valley I*); *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). In *Delaware Valley I*, the Court noted that " '[w]hen . . . the applicant for a fee has carried his [or her] burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee' to which counsel is entitled." 478 U.S. at 564 (emphasis in original), *citing Blum v. Stenson*, 465 U.S. at 897. The Court also stated that

> the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. Although upward adjustments of the lodestar figure are still permissible, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and detailed findings by the lower courts.

478 U.S. at 565 (citations omitted), *citing Blum v. Stenson*, 465 U.S. at 898-01. Accordingly, the first four factors enumerated by the district court cannot support its enhancement of the attorney's fee award.

The Court in *Delaware Valley I* left open the question whether the risk of loss could serve as a factor supporting enhancement of an award of attorney's fees. The Court returned to that question in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) (*Delaware Valley II*). Four justices in *Delaware Valley II* reached the conclusion that risk of loss could not serve as an enhancement factor. *Id.* at 3086-89 (White, J., with whom

Rehnquist, C.J., and Powell and Scalia, JJ., joined). Justice O'Connor concurred with these four justices on the understanding that although risk of loss was not properly applied on the facts before the Court, Congress did not intend to exclude the possibility of enhancing an attorney's fee award because of the risk of loss. *Id.* at 3089-91 (O'Connor, J., concurring in part and concurring in the judgment). This circuit requires an applicant to "demonstrate that enhancement [is] necessary to attract competent local counsel in light of the risk of loss arising from the [applicant's] contingency fee arrangement." *Catlett v. Missouri Highway & Transportation Comm'n*, 828 F.2d at 1271. *See also Delaware Valley II*, 107 S.Ct. at 3091 (O'Connor, J., concurring in part and concurring in the judgment); *Norman v. Housing Authority*, 836 F.2d 1292, 1302 (11th Cir. 1988); *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987); *Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1735 (1988); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 379-82 (3d Cir. 1987). This is because fee-shifting statutes

> were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his [or her] client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.

Delaware Valley I, 478 U.S. at 565.

The district court's original findings did not focus on the necessity of the enhancement in order to attract competent local counsel in light of the risk of loss arising from the contingent nature of the fee. Because the enhancement was therefore unsupported by the district court's findings, we remanded the case to the district court for the limited purpose of making additional factual findings

on this issue while retaining jurisdiction over the appeals. We also instructed the district court to make findings with respect to the extent to which the enhancement was based on the contingent nature of the fee.

After considering affidavits submitted by both parties from lawyers in the local community, the district court found that in the absence of fee enhancement to compensate for the risk of loss arising from the contingency fee arrangement, "[appellants] would have faced substantial difficulty in finding counsel of sufficient competency in this market." *Gilbert v. City of Little Rock*, No. LR-C-78-340, slip op. at 2 (E.D. Ark. Aug. 2, 1988) (order). The district court also clarified that "roughly two-thirds of the enhancement" was attributable to the risk of loss arising from the contingent nature of the fee. *Id.*, at 3. We conclude that the district court's enhancement of Ohm's and Duncan's fee award was proper, but only to reflect enhancement solely for the risk of loss due to the contingent nature of the fee. Reducing the enhancement from fifteen percent to ten percent to reflect the extent to which this factor contributed to the enhancement of the fee, we award Ohm $24,220.00, and Duncan $136,790.50 as attorney's fees.

Accordingly, the order of the district court is affirmed as modified herein.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE GILBERT, et al. PLAINTIFFS

V. NO. LR-C-78-340

CITY OF LITTLE ROCK,
ARKANSAS, et al. DEFENDANTS

ORDER

On July 15, 1988, the Eighth Circuit Court of Appeals remanded this cause to this Court "for the limited purpose of making further findings of fact with regard to the enhancement of Mr. Ohm's and Mr. Duncan's attorney's fee award." More specifically, the Eighth Circuit directed this Court to address:

> (1) whether "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,' " (citations omitted), and
>
> (2) the extent to which the court's 15% enhancement is based upon the contingent nature of the fee.

By its Order dated July 18, 1988, this Court directed the parties to file briefs addressing these questions and to notify the Court if a hearing was desired. Although neither side finds a hearing necessary on these points, both sides have submitted briefs and affidavits to the Court. Plaintiffs submitted affidavits from three of their number and five local attorneys, two of whom are plaintiffs' counsel herein. Defendants filed one affidavit from a local attorney.

Initially, the Court notes that in calculating the fees to which plaintiffs' counsel were found to be entitled, the concepts of "risk" and "contingent nature of the fee" were viewed as basically addressing the same concern—that is, if their efforts proved unsuccessful, plaintiffs' counsel might expend many long and difficult hours on the case and not receive any compensation whatsoever for their services. With respect to the queries of the Eighth Circuit, the Court is convinced that a considerable degree of skill and expertise was required of counsel in this difficult case. The affidavits submitted by plaintiffs from three of the leading civil rights attorneys in the State of Arkansas reveal that "risk adjustment" is essential, for a number of economic reasons, to their acceptance of civil rights cases. While plaintiffs may have been able to find some counsel from Little Rock or the surrounding area to represent them in this case even without the possibility of risk adjustment, the Court finds from the affidavits submitted that plaintiffs would have faced substantial difficulty in finding counsel of sufficient competency in this market if such adjustments were barred outright.

The Court's determination that a 15% enhancement of the fees awarded Mr. Ohm and Mr. Duncan was appropriate in this cause was based almost entirely upon the factors of "risk/contingent nature of the fee" and "the undesirability of the case." The Court found the latter to be applicable to this case due to the possibility that plaintiffs' counsel would be stigmatized on account of the nature of the litigation and the parties involved. The other factors cited in the Court's Opinion of August 4, 1987 were of marginal significance, at best, in the Court's calculations. Although the Court did not at the time of the making of the fee awards assign an exact value to the "risk/contingent nature of the fee" factor in arriving at the 15% enhancement, the Court can say that roughly two-thirds of the enhancement was attributable to that factor.

This Order shall be certified to the Eighth Circuit Court of Appeals consistent with its Order of July 15, 1988.

Additionally, the affidavits submitted to the Court by both parties shall be made a part of the record herein.

DATED this 2nd day of August, 1988.

/s/ Elsijane T. Roy
United States District Judge

This document entered on docket sheet in compliance with Rule 58 end/or 79(a) FRCP on 8-3-88 by DC.

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE GILBERT, HORACE WALTERS,
ANDREW LOCKHART and
BILLY O'DONALD PLAINTIFFS

VS. NO. LR-C-78-340

CITY OF LITTLE ROCK, ARKANSAS;
THE CIVIL SERVICE COMMISSION OF
THE CITY OF LITTLE ROCK, ARKANSAS;
WALTER E. "SONNY" SIMPSON, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS CHIEF
OF POLICE OF THE CITY OF LITTLE ROCK,
ARKANSAS; and CARLTON E. McMULLEN,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS CITY MANATER OF THE CITY
OF LITTLE ROCK, ARKANSAS - DEFENDANTS

MEMORANDUM OPINION

Pending before the Court is plaintifffs' Petition for Attorney's Fees and Costs pursuant to 42 U.S.C. §1988, to which defendants have fully responded. Also before the Court is the issue of the amount of back pay to which one plaintiff, Horace Walters, is entitled, the parties having stipulated to the amounts which plaintiffs Johnnie Gilbert, Billy O'Donald, and Andrew Lockhart should receive.

I. *Horace Walters' Back Pay*

On August 28, 1986, the United States Court of Appeals for the Eighth Circuit filed its Opinion in this cause (*Gilbert II*) in which it directed, *inter alia*, that plaintiffs Gilbert, O'Donald, Lockhart, and Walters be given

permanent promotions to sergeant as soon as positions are available, and that they be compensated for lost wages and benefits from the dates they would have been promoted absent discrimination until they actually were promoted. [1] As noted previously, the parties stipulated to the relief to which Gilbert, O'Donald and Lockhart were entitled. From the pleadings recently filed, it appears that the Court need only address the issue of back pay for plaintiff Walters.

Walters was actually promoted to sergeant in 1980, not long after the date the Eighth Circuit found he would have been promoted had he not been discriminated against on account of his race. For that reason, he received a higher salary than Gilbert, O'Donald, and Lockhart during the several years that followed. On account of this, defendants contend that Walters is entitled to less back pay than the others, by their figures $331.73. On the other hand, Walters asserts that he is entitled to $9,324.95. Walters claims that he should have been promoted to lieutenant in October of 1981, rather than October of 1983, the actual date he became a lieutenant, and that he should receive back pay for that deprivation, as well. The disparity between plaintiffs' and defendants' back pay figures primarily stems from their difference of opinion as to when Walters should have been made lieutenant.

Although determined to make Walters whole for the injuries he suffered at the hands of defendants, the Court cannot say with certainty that he would have been promoted to lieutenant in October of 1981 but for the unlawful discrimination. Clearly, the Court cannot award any relief, back pay or otherwise, on such a speculative

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The mandate from the Eighth Circuit was received by this Court on November 10, 1986. After several extensions of time for each side to prepare its pleadings and briefs, this matter became ripe for consideration on May 26, 1987. However, additional briefs were received in response to the United States Supreme Court's decision in *Crawford Fitting Company v. J.T. Gibbons, Inc., infra.*

basis. Accordingly, the Court finds that Horace Walters is entitled to back pay from defendants in the amount of $331.73, representing the salary he was denied by virtue of the delay of his promotion to sergeant. Inasmuch as the other types of relief mandated by the Eighth Circuit have not been addressed by the parties in their pleadings and memoranda, the Court assumes that those matters have been disposed of through stipulation.

II. *Attorney's Fees and Costs*

Defendants concede that, for the purposes of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, plaintiffs are "prevailing parties" herein and are entitled to an award of reasonable attorney's fees and costs. That given, this Court need only determine what amount of fees and costs will be "reasonable" under the circumstances of this case, as guided by the pronouncements of the United States Supreme Court and the Eighth Circuit Court of Appeals on the subject.

A. *Attorney's Fees*

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S 424, 433 (1983); *see also Blum v. Stenson*, 465 U.S. 886 (1984) ("product of reasonable hours times a reasonable rate normally provides a reasonable attorney's fee within the meaning of the statute"). This computation yields what is known as the "lodestar" amount. Although this formula provides a sound basis for computing an estimate of the fee a lawyer should receive in any particular case, it "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley v. Eckerhart, supra*, at 434. Other factors which should be considered in determining the

propriety of fee enhancement or reduction are set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) [2].

Plaintiffs, through the affidavits of their counsel, request attorney's fees for the hours reflected below at the claimed hourly rates, as follows:

Attorney	Hours Expended	Hourly Rate	Lodestar Fee
Phillip J. Duncan	1,662.69	$125.00	$207,836.25
Thomas M. Bramhall	153.75	$125.00	19,218.75
Ralph C. Ohm	354.94	$65.00	23,071.10
Ralph C. Ohm (law clerk)	239.50	$25.00	5,987.50
TOTAL			$256,113.60

In addition, plaintiffs have asked the Court to enhance the amount of the requested fees on account of, among other things, the quality of representation, the complexity of the issues, and the risk of receiving no fee at all.

With but a few exceptions, defendants contend that the hours claimed to have been expended and the hourly rate of pay requested by plaintiffs' counsel are unreasonable and excessive. The Court will address the merits of the petition as it relates to each attorney individually.

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Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and abilities of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-719.

1. Thomas M. Bramhall

Regarding the request for Mr. Bramhall, defendants concede the reasonableness of the 153.75 hours he claims to have expended on this case; however, they challenge the $125.00 hourly rate requested for him. In support of the request, plaintiffs have attached affidavits from several members of the local bar attesting to the considerable ability and experience of Mr. Bramhall as a trial attorney.

Mr. Bramhall devoted approximately four weeks time to preparation and presentation of this case on retrial. Plaintiffs ultimately prevailed on most of the issues litigated during his participation. The Court acknowledges his experience and competence as an attorney. Based upon the arguments of counsel and the affidavits in support thereof, the Court finds that Mr. Bramhall should be compensated at the rate of $110.00 per hour for his services rendered to plaintiffs herein. That figure is consistent with prevailing rates in the Little Rock area for experienced counsel in difficult civil rights cases. Due to his relatively brief involvement in this matter, the Court is of the opinion that no enhancement of Mr. Bramhall's fee is warranted. Nor is any reduction appropriate on account of the success ultimately obtained. Accordingly, an attorney's fee in the amount of $16,912.50 is awarded for Mr. Bramhall.

2. Ralph C. Ohm

Defendants object not only to the number of hours expended by Mr. Ohm, but also to the $65.00 hourly rate requested for his attorney services. The Court finds no merit in most of defendants' contentions with respect to Mr. Ohm's representation. However, the Court agrees that the number of attorney hours claimed should be slightly reduced due to duplication of the efforts of Messrs. Bramhall and Duncan. Mr. Ohm shall be compensated for 300 hours at the rate of $65.00 per hour for his attorney time, as well as for all claimed law clerk time at the rate of

$25.00 per hour. Accordingly, the Court finds that for his efforts on behalf of plaintiff, a reasonable fee for Mr. Ohm is $19,500.00 for services as attorney and $5,987.50 for services as law clerk, or a total lodestar of $25,487.50. The Court further finds that the attorney's fee portion of the lodestar should be adjusted. Reduction of that figure by 15% is warranted due to plaintiffs' failure to completely prevail. Only four of the thirteen original plaintiffs in this cause were granted relief, and a number of plaintiffs' claims were found to lack merit. However, an enhancement of 15% is appropriate on account of the undesirability of this case, the difficulty of the questions presented, the time and labor required, the length of the professional relationship with plaintiffs, and the contingent nature of the fee. Thus, the adjusted attorney's fee award for Mr. Ohm's services is $19,061.25. The total award for his services shall be $25,048.75.

3. Phillip J. Duncan

The major point of contention between the parties with regard to attorney's fees concerns the fee requested for Mr. Duncan—$207,836.25. Defendant contends that both the $125.00 hourly rate requested and the 1,662.69 hours expended are grossly excessive and unreasonable.

After carefully reviewing Mr. Duncan's detailed record of his time expended on this case, the Court feels compelled to agree with defendants that the number of hours claimed is excessive. The time record reflects entries for "research" or "study case law" on well over a hundred days during his work on this case. Although it is indeed reasonable for an attorney to engage in a certain amount of research in preparing a case for trial, the Court finds that it would be inequitable to require defendants to compensate Mr. Duncan for all of his research time. Considering the circumstances of this case and the time and effort required to fully present plaintiffs' claims, the Court finds that the number of hours which Mr. Duncan should have reasonably

expended on this case is 1,330, or roughly 80 per cent of what has been claimed.

Defendants contend that Mr. Duncan should be compensated at the rate of $90.00 per hour, rather than $125.00, as requested, for his professional services rendered herein. Based on the affidavits of other local counsel, as well as the pleadings and memoranda of the parties, the Court finds that a rate of compensation for Mr. Duncan of $110.00 per hour for all time reasonably expended from 1980 to the present is both reasonable and fair. The product of Mr. Duncan's allowed hours times the approved hourly rate yields a lodestar of $146,300.00. Using the reduction and enhancement percentages set out previously with respect to the fee for Mr. Ohm, the Court finds that plaintiffs should be awarded $143,008.25 in attorney's fees for the services of Mr. Duncan. Total attorney's fees (including law clerk compensation) in the amount of $184,969.50 are hereby awarded.

B. *Costs*

Plaintiffs request that they be awarded costs from defendants in the total amount of $103,534.01, consisting of transcript and deposition costs, other out-of-pocket expenses, and expert witness fees. Defendants argue, for a number of reasons, that they should be compelled to pay only a fraction of those costs. The Court will address each element of these costs separately.

1. Transcript and Deposition Costs

Defendants have, "in the interest of fairness," stipulated that plaintiffs should be reimbursed all of the $3,302.35 they have requested for transcript and deposition costs. That sum is hereby awarded to plaintiffs from defendants.

2. Out-of-Pocket Expenses

Plaintiffs seek reimbursement for a miscellany of expenses in the aggregate amount of $6,284.97. Defendants concede the fairness and reasonableness of $3,960.24 of such expenses, but dispute the remainder.

Defendants' primary objection in this area concerns plaintiffs' request for reimbursement of air fare, hotels and meals, printing expenses and express mail costs incurred while this case was before the Eighth Circuit on appeal. After reviewing the cost statement and the arguments of counsel, the Court finds that defendants' contentions have merit. In an order dated February 5, 1987, the Eighth Circuit declined to reconsider its previous denial of plaintiffs' petition seeking additional costs. In that order, the Eighth Circuit stated "[i]t was the intent of this Court in our December 31, 1986 order to award the appellants $30,679 in attorneys' fees and $915.87 in costs for all services rendered with respect to all appeals to this Court. The Court now adheres to that ruling." The Eighth Circuit having awarded plaintiffs what it determined to be a fair amount for expenses incurred on appeal, it would be inappropriate for this Court to look beyond that award. Accordingly, plaintiffs are hereby awarded their district court level out-of-pocket expenses from defendants in the amount of $3,960.24.

3. Expert Witness Fees

By far the largest component of plaintiffs' statement of costs is the request for expert witness fees and expenses, which totals $93,946.69. Plaintiffs make this request pursuant to 28 U.S.C. §1920 and Rule 54 of the Federal Rules of Civil Procedure, as well as 42 U.S.C. §1988. Defendants contend that the request is grossly excessive and argue that plaintiffs should receive far less remuneration for these expenses.

Until recently, the Court would have been inclined to award plaintiffs the lion's share of the expert witness fees requested. However, this issue has been made more difficult by the United States Supreme Court's holding that ". . . absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the [$30-per-day] limitations set out in 18 U.S.C. §1821 and §1920." [3] *Crawford Fitting Company v. J.T. Gibbons, Inc.*, ____ U.S. ____, 107 S.Ct. 2494, 96 L.Ed.2d 385 (June 15, 1987). Although the concurring and dissenting opinions in *Crawford Fitting* recite the understanding that the holding does not reach the question of whether a district court may award fees for an expert witness under 42 U.S.C. §1988, the majority declined the opportunity to so limit their decision.

Reimbursement of prevailing parties for the fees of expert witnesses has often been approved, in some cases under 28 U.S.C. §1920 and Federal Rule of Civil Procedure 54(d), *see e.g., Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3rd Cir. 1981), while in others pursuant to 42 U.S.C. §1988, *see e.g., Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (overruled by *International Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174 (5th Cir. 1986) (en banc), *aff'd.*, ____ U.S. ____, 107 S.Ct. 2494, 96 L.Ed.2d 385 (June 15, 1987). [4] Although not expressly disallowing the practice, some courts have ruled that it is not an abuse of discretion for a district court to decline to award compensation for expert witness fees to a prevailing party. *E.G., Davis v. Richmond, Fredericksburg & Potomac*

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As is apparent from the remainder of the opinion in *Crawford Fitting*, the citation in the quoted sentence to "18 U.S.C. §1821 and §1920" is merely a typographical error and should cite "28 U.S.C. §1821 and §1920."

4

This case was consolidated on appeal by the United States Supreme Court with *Crawford Fitting*.

R. Co., 803 F.2d 1322 (4th Cir. 1986); *Walker v. Robbins Hose Co. No. 1, Inc.*, 622 F.2d 696 (3rd Cir. 1980).

The Eighth Circuit Court of Appeals has consistently approved awards for expert witness fees to prevailing parties. *E.g., Wilmington v. J.I. Case Co., supra; Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982); *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1984). In *Paschall*, the Eighth Circuit adopted the approach of the Third Circuit set out in *Roberts v. S.S. Kyriakoula D. Lemos, supra*, and followed the developing trend of allowing recovery of "expert witness fees when the expert's testimony was crucial to the resolution of the case." 695 F.2d at 338. In choosing that course, the Eighth Circuit cited *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1965), noting that in that case "the Supreme Court indicated that Fed.R.Civ.P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. §1821." *Id.*

In determining that expert witness fees were recoverable under 28 U.S.C. §§1821 and 1920 and Federal Rule of Civil Procedure 54(d), it appears that both the Eighth Circuit and the Third Circuit relied heavily on the statement in *Farmer v. Arabian American Oil Co.* that "[T]he discretion given district judges [by Rule 54(d)] to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. at 235. In *Crawford Fitting*, however, that statement and the notion that it authorizes an award of costs outside those specified in §1821 and §1920 were expressly disapproved.

In light of *Crawford Fitting*, this Court is convinced that it can tax as costs expert witness fees in excess of the $30-per-day limit of §1821 only where expressly authorized by statute or agreement. Congress has indeed shown a willingness to explicitly provide for their recovery, for "[a]t least twenty-eight statutes provide for the taxing of expert witness' fees as costs in civil actions, albeit under varying

standards . . . ." *International Woodworkers of America, supra*, 790 F.2d at 1179 n.7. As an example, section 307(f) of the Clean Air Act, 42 U.S.C. §7607(f) (1982), provides:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

But, for whatever reason, Congress chose not to expressly provide in 42 U.S.C. §1988 for the recovery of expert witness fees in civil rights cases. As noted by Circuit Judge Godbold in his dissenting opinion in the civil rights case of *Jones v. Diamond, supra*, 636 F.2d at 1391:

> No Act of Congress is cited as authority for this proposition [that plaintiffs may recover expert witness fees]; indeed, there is none. Instead, the majority opinion relies on a Senate Report concerning legislation which could have contained such a provision, but *did* not.

There simply is no explicit statutory authority which would allow this Court to award plaintiffs expert witness fees in excess of $30 per day. Accordingly, plaintiffs shall be recompensed for their expert witness fees in the following amounts:

James L. Outtz	$ 330.00
E. Lee Hoffman	480.00
Rawleigh H. Rawls	90.00
Total	$ 900.00

The Court is not unmindful of the burden that this finding places on civil rights plaintiffs, not only in the instant case, but in others, as well. However, this Court is constrained to follow the pronouncements of the United

States Supreme Court. That constraint mandates the result reached herein.

In summary, the Court finds that plaintiffs shall receive from defendants total attorney's fees in the amount of $184,969.50, and total costs of $8,162.59. [5] Judgment shall be entered in accordance with this Opinion.

DATED this 4th day of August, 1987.

/s/ Elsijane T. Roy
United States District Judge

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5 The attorney's fees figure set out herein does not include sums paid by defendants to Messrs. John Walker and Emmanuel Pruitt pursuant to stipulation for attorney services on behalf of plaintiffs earlier in the case.